

1                   IN THE UNITED STATES DISTRICT COURT FOR THE  
2                   DISTRICT OF HAWAII  
3     'ILIO'ULAOKALANI COALITION,     )     CIVIL NO. 04-00502DAE  
4     a Hawaii nonprofit             )  
5     corporation; NA 'IMI PONO, a     )  
6     Hawaii unincorporated           )  
7     association; and KIPUKA, a       )  
8     Hawaii unincorporated           )  
9     association,                     )  
10                   Plaintiffs,       )  
11                   vs.                )  
12                   DONALD H. RUMSFELD, Secretary     )  
13                   of Defense; and Les Brownlee,     )  
14                   Acting Secretary of the U.S.     )  
15                   Department of the Army,           )  
16                   Defendants.                        )  
17                   \_\_\_\_\_  
18                   STATUS CONFERENCE  
19                   AND ORAL ARGUMENTS

12                   TRANSCRIPT OF PROCEEDINGS  
13                   BEFORE THE HONORABLE DAVID ALAN EZRA,  
14                   UNITED STATES DISTRICT JUDGE

14     APPEARANCES:

15     For the Plaintiffs:             DAVID L. HENKIN, Esq.  
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**EXHIBIT 1**

1 APPEARANCES (Continued):

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20 Official Court Reporter:

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Proceedings recorded by machine shorthand, transcript produced  
with computer-aided transcription (CAT).

1 THE COURT: All right. So --

2 MR. HENKIN: But there may be flexibility in the  
3 future if we have an opportunity to figure out exactly what  
4 they propose.

5 THE COURT: Now, what I am not entirely convinced of,  
6 I should say, is the need for -- well, I can tell you one  
7 thing. I am convinced there is no immediate need for extensive  
8 discovery on these six issues in light of the -- of the  
9 requirement that the court expeditiously resolve the matter.

10 I mean if we were talking about a normal remand to  
11 this court, in other words, the court issues an order, the  
12 order is reversed 2-1, it comes back to this court, and people  
13 are litigating, fine. I mean you just do discovery and that's  
14 what the court would do. But that's not the posture, okay.  
15 That's why I say that this is a very unusual case. That's not  
16 the posture that this has been remanded to me in.

17 I've been instructed, even in their clarification  
18 order, to -- not yet, Mr. Henkin. I know you're anxious.

19 MR. HENKIN: I'm anxious, Your Honor.

20 THE COURT: I will give you -- you've litigated before  
21 me many times, Mr. Henkin. You know you'll get a full  
22 opportunity and you will have a full opportunity.

23 MR. HENKIN: Thank you, Your Honor.

24 THE COURT: The appellate court used the term  
25 "expeditious" in their clarification order several times.

1   Expeditious means expeditious. It doesn't mean next year, it  
2   doesn't mean 2 years from now. This case is not going to go  
3   away in 2 years. It's going to be around. And there are other  
4   aspects of this case that are going to be litigated for a long  
5   time and we're all going to be here -- I mean maybe not all the  
6   spectators, but the lawyers and I will be here and we will  
7   litigate this case for a very long time.

8           Usually in these cases you get a big public flare-up  
9   and you get all the publicity. It's like when I issued the  
10   injunction to stop longline fishing and they were protesting  
11   out there against me and putting ads on the radio and the  
12   television, you know, that I was going to destroy Hawaii's  
13   fishing industry and so on and so forth by, you know, abiding  
14   by the environmental laws. That case went on for 2 years after  
15   all the, you know, hoopla. Well, that's what's going to happen  
16   here. This case is going to be litigated out over a period of  
17   probably 2 to 3 years, I think.

18           But what happens in the meantime, in the immediate  
19   meantime simply is to put an appropriate injunction into place  
20   while the appellate process for this Phase One of this  
21   litigation goes forward on the Motion to Dismiss and set the  
22   framework while the other litigation is ongoing, the underlying  
23   litigation.

24           So I am not inclined, Mr. Henkin, I will tell you  
25   this, to allow extensive discovery as you have requested.

1 have me overturned or affirmed, and if I rule for you in whole  
2 or in part you will seek the same thing. You will all go right  
3 back up to the Ninth Circuit and -- and at that time you can  
4 seek clarification from them as to the scope of the order that  
5 I've issued and what they intend to do with it.

6 MR. HENKIN: Just with respect to framing the  
7 discovery, Your Honor, it would be helpful to know if we're  
8 briefing pending their compliance with NEPA and then issues of  
9 how long they expect that will take would come into play, or  
10 whether it's until the arrival of some other event. The  
11 issuance of the mandate, as you know, Your Honor, is --

12 THE COURT: The easiest thing to do is to do discovery  
13 because you're going to be doing it on an expedited basis. I  
14 intend to allow additional discovery, Mr. Henkin. There will  
15 be additional discovery in this case.

16 This discovery that we're talking about is only  
17 discovery pending the issuance of an interim injunction.  
18 That's all. And I think you should look at the shorter period  
19 of time. That's the safest thing for you to do. And then --  
20 because you are going to be permitted, as the Army is,  
21 substantial additional discovery in this case as we move  
22 forward, which is going to be far more extensive and far more  
23 broad.

24 The only question is: What is the Army going to be  
25 permitted to do in terms of training and in terms of combat

1 preparation in the -- in the interim. And the interim that  
2 will be decided by the Ninth Circuit -- and, quite frankly, as  
3 I told you, we really don't know what is going to happen with  
4 this case. I am -- I would be shocked, quite frankly, if the  
5 Army did not seek en banc review. I would even be more  
6 shocked, quite frankly, if even if the Army doesn't seek it,  
7 some judges on the Ninth Circuit don't seek it on their own,  
8 because they have the right to do that and this is a big case  
9 and in these kinds of cases that's what happens.

10 And I don't say that because I'm suggesting that there  
11 are a lot of judges that don't agree or disagree, but we do  
12 know that there is at least one judge that disagrees because he  
13 wrote a very extensive dissent.

14 So, I am quite sure that somebody's going to call for  
15 a sua sponte en banc even if the parties don't, but I can't  
16 imagine the Army not doing that.

17 Now, that may be denied. If it's denied they have the  
18 right to seek certiorari if -- either side. So whatever  
19 happens is necessarily interim until we find out exactly what  
20 the scope of the appellate review will be and what the final  
21 answer will be.

22 MR. HENKIN: Thank you, Your Honor.

23 THE COURT: So obviously this is discovery which is  
24 designed to give the parties the opportunity to develop a  
25 better record for both me and for the appellate court, quite

1 COURT REPORTER'S CERTIFICATE

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3 I, CYNTHIA FAZIO, Official Court Reporter, United  
4 States District Court, District of Hawaii, Honolulu, Hawaii, do  
5 hereby certify that the foregoing pages numbered 1 through 30  
6 is a correct transcript of the proceedings had in connection  
7 with the above-entitled matter.

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DATED at Honolulu, Hawaii, March 9, 2007.

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/s/ Cynthia Fazio  
CYNTHIA FAZIO, RMR, CRR

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